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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JOHN C. HEFLEBOWER,

Plaintiff and Appellant,

v.

RYAN BEARD,

Defendant and Respondent.

F074762

(Super. Ct. No. 14CECG01418)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Kristi Culver Kapetan, Judge.

Fowler / Helsel / Vogt, Jason A. Helsel, Mark A. Vogt and John C. Fowler for Plaintiff and Appellant.

McCormick, Barstow, Sheppard, Wayte & Carruth, James P. Wagoner and Scott M. Reddie for Defendant and Respondent.

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In this personal injury case, the dispositive legal question before the trial court was whether primary assumption of the risk applied as a defense to the action. Defendant Ryan Beard (defendant) lost his grip while swinging an aluminum baseball bat, the bat

flew out of his hands and struck plaintiff John C. Heflebower (plaintiff) in the face. Plaintiff brought suit to recover damages for his injuries and the case proceeded to jury trial. At trial, the testimony was in conflict on whether defendant was engaged in a sport activity (versus mere horseplay) at the time of the accident, and on the nature of plaintiff's relationship to that activity. On a special verdict form containing a series of questions, the jury made findings of fact that (1) defendant was participating in a sports activity at the time plaintiff was injured, (2) plaintiff was not participating in the sports activity at that time, (3) plaintiff knew the sports activity was occurring when he was injured, and (4) defendant's conduct was not so reckless that it was entirely outside the range of ordinary activity involved in the sports activity. Based on these findings of fact, the trial court concluded that primary assumption of the risk was applicable and barred plaintiff's claims. In so holding, the trial court apparently relied on the well-recognized proposition that being hit by an accidentally thrown baseball bat is an inherent risk assumed by baseball game spectators and persons in the field of play. Plaintiff filed the instant appeal from the resulting judgment. We conclude the trial court prejudicially erred because the jury did not make, and was never asked to make, findings of fact on the special verdict form that plaintiff was either involved as a spectator or positioned in the field of play. Lacking such essential findings by the jury, the trial court could not properly conclude that primary assumption of the risk was applicable in the unique circumstances of this case. Accordingly, we reverse the judgment of the trial court and remand the matter to the trial court for a new trial.

FACTS AND PROCEDURAL HISTORY

The incident occurred on July 4, 2013, during a barbeque and pool party at the home of plaintiff's friends, Guy and Debby Desrosiers, in a backyard area which included a lawn, a swimming pool and a patio. Defendant, who was age 16, was there with his 16-year-old friend Tyler Heflebower (Tyler) and Tyler's 13-year-old brother

Joshua Heflebower (Josh).[1] Plaintiff is Tyler's and Josh's father. In addition to swimming in the pool and other activities, the three boys (defendant, Tyler and Josh) played "home run derby" on the lawn. Home run derby was described as a contest in which someone would pitch the wiffle ball to the batter and the batter would try to hit the ball for distance. If the batter hit the ball all the way to the pool or beyond, it was a home run. If not, it was an out. The third player would shag balls. After each batter finished his turn at bat, the players would rotate their positions. At one point, plaintiff took a turn at bat, but he was disappointed by his effort since he only hit a soft ground ball. Plaintiff would also occasionally shag a hit ball and toss it back to the boys if the ball landed in the pool.

Defendant, Tyler and Josh were on their school baseball teams or on a club team, and plaintiff himself had previously played baseball in college and had coached baseball. All were very familiar with the game. Plaintiff admitted that it was a foreseeable risk that a bat could slip out of a batter's hands when swinging at a pitch.

Plaintiff's Theory of the Case

Plaintiff's theory, according to his second amended complaint, was that at the time of the accident defendant was not engaging in home run derby, hitting pitches for distance or any other sport activity, but was carelessly mimicking the forceful swing of Yasiel Puig, a major league baseball player allegedly known for a violent backswing. Allegedly, while mimicking Puig's swing, the bat slipped out of defendant's hands and struck plaintiff, who was unaware of what defendant was doing and was simply attempting to find a towel and dry off after getting out of the pool. In closing argument, plaintiff's attorney characterized defendant's actions as negligent horseplay, messing around with the bat, screwing off, but *not* a sports activity. Plaintiff's complaint sought to recover damages premised on defendant's careless and negligent conduct.

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[1] First names are used for convenience only; no disrespect is intended.

Defendant's Theory of the Case

Defendant's answer to the second amended complaint asserted the affirmative defense of assumption of the risk. Nearly all of defendant's evidence and argument focused on this defense. Throughout the trial and in closing argument, defendant's position was that at the time the bat slipped out of his hands he was engaged in the sport activity of hitting pitches for distance or home run derby, and that plaintiff was a spectator about 10 to 15 feet away. Defendant admitted he was trying to make a joke at the time of the injury to show that Puig was a better hitter than Buster Posey, but in the course of making the joke he was still engaged in the activity of home run derby and/or of swinging at pitches and attempting to hit home runs. According to defendant, while he was engaged in that sport activity, the bat slipped out of his hands.

Conflicting Evidence At Trial

There was conflicting testimony at trial about what was happening in the moments before plaintiff was hit by the accidentally thrown bat, including whether home run derby, or something similar to it, was actually in progress and, if so, whether plaintiff was aware of that fact and what his relationship was to that sport activity. As background, we briefly summarize the witnesses' divergent versions of what took place.

Defendant testified that, at the time of plaintiff's injury, he, Tyler and Josh were in their positions on the lawn for pitching, hitting and shagging involved in home run derby, but they were no longer keeping score of the home runs. Although not playing the game in the sense of keeping score, in other respects the activity was the same as home run derby. The ball was being pitched by Tyler, Josh was shagging balls and defendant was the batter. There had been an ongoing joke or banter between defendant and the Heflebowers, including with plaintiff, about whether the Dodgers were better than the Giants. The Heflebowers were big Giants fans. According to defendant, when he took a turn at bat, Tyler pitched the ball and defendant swung and intentionally missed the pitch with a feeble swing while announcing to the others that *that* was a San Francisco Giants'

player. As another pitch was thrown to him by Tyler, defendant announced "this is Puig now" toward plaintiff whom defendant could see standing 10 or 15 feet away, just over defendant's left shoulder. Defendant testified he was trying to hit a home run at that moment (using his regular home-run swing) to show that the Dodgers were better than the Giants, but in doing so the bat accidentally flew out of his hands and struck plaintiff. Consistent with defendant's account, the paramedics that arrived at the scene indicated in their records that plaintiff told them he was "playing baseball in the backyard when he was accidentally hit in the face with a baseball bat." Defendant had also testified that although there was a plastic bat available, they realized it was broken and that no one would be able to hit home runs with it, so they only used the metal bat.

In contrast, Tyler testified at trial that they had stopped playing home run derby when it was time for dinner and did not resume the game afterwards. The incident occurred after dinner. According to Tyler, he and defendant got into a debate about who was a better hitter between Yasiel Puig and Buster Posey. Tyler's dad (plaintiff) was not part of that conversation. After dinner, defendant walked over and picked up the metal bat and started to demonstrate how Puig and Posey swing. Tyler testified that no one was pitching to defendant at that time; defendant was just taking exaggerated swings to imitate the players. When defendant took an especially hard cut to show how Puig swings, the bat went flying in the air and hit Tyler's dad. Testimony from Tyler's prior deposition was introduced as impeachment, which indicated that at the time of injury the boys were playing home run derby, but that in the midst of the game defendant took some dry cuts (i.e., no ball was pitched) to demonstrate the swing of Posey and Puig. Tyler indicated they began earlier in the day using a plastic bat, but they switched to the metal bat. At trial, Tyler insisted his dad had used the plastic bat when he took a turn at bat, but Tyler's prior deposition testimony had stated that he could not recall whether his dad used a metal or plastic bat.

In Josh's testimony at trial, he gave an account that was substantially the same as Tyler's. According to Josh, there was no game of home run derby going on after dinner when the accident occurred. Rather, defendant just went over and picked up the bat and started to imitate Puig and Posey. When defendant was demonstrating Puig's swing, he swung the bat too hard and it slipped out of his hands. Josh said there was no ball being pitched to defendant at the time; defendant was just messing around or goofing off. Josh agreed with counsel's characterization that defendant was simply engaging in horseplay. Josh testified his dad was about 30 feet away from defendant when the bat hit him. During cross-examination, Josh's prior deposition testimony was introduced for impeachment purposes, wherein Josh had admitted that his mom or dad cautioned him "don't ever say anything that might indicate dad was participating in the game."

Plaintiff testified that, after dinner, he cleaned up the barbecue and got in the pool to cool off. Then, he got out of the pool and started looking around the patio area for a towel. While on the patio, he also glanced around the corner to see if there were any towels along the back wall of the garage. He could not find a towel, so he put on his shirt. When he looked up from putting on his shirt, he got hit in the face by the baseball bat. Plaintiff testified that in the period of time after he got out of the pool and was looking for a towel—i.e., the moments before getting hit by the bat—he was not paying attention to any other people in the backyard, and he did not observe or know what they were doing.

Plaintiff further testified that sometime before dinner, the boys were playing home run derby with a wiffle ball and a plastic bat. He stated that he took a turn at bat, but there was only a plastic bat, not a metal bat. When asked on cross-examination whether he had been aware all along of the metal bat because it was the same bat he used when he took a turn at bat before dinner, plaintiff denied it. Plaintiff's trial testimony was impeached by his prior deposition testimony in which he had given a very definite and detailed account of the metal bat as "the only one" he saw and used, describing it as a

small metal T-ball bat, and stating that he was not aware of there ever being a plastic bat. Plaintiff also admitted on cross-examination that when the boys were hitting the wiffle ball he could hear a "ping of that bat" which he believed resulted from use of a metal bat.[2]

Plaintiff's Motion to Amend

During the fourth day of trial, plaintiff's counsel made an oral motion to amend the complaint to conform to proof regarding the nature of defendant's conduct. Specifically, plaintiff wanted to allege that defendant swung the bat so forcefully and in such a manner as to be "so far outside" what was normal to the game that it could be considered "reckless" and not merely negligent. The trial court denied the motion, but reserved the possibility of permitting the jury to address the issue of recklessness "assuming that the jury answers certain preliminary fact questions in a certain way." Ultimately, the trial court did allow the jury to make a preliminary fact finding about whether defendant acted recklessly.

Special Verdict Form for Findings of Fact

After the evidentiary portion of the case was concluded, the trial court and the parties' counsel discussed having the jury resolve certain preliminary factual issues to assist the trial court in determining the legal question of the applicability of assumption of the risk. It was agreed that a special verdict form should be prepared for that purpose. After lengthy discussion with the parties' counsel on what matters should be included on the special verdict form, the trial court proposed the version of the special verdict form that was ultimately used.

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[2] Plaintiff's only explanation for changing his testimony was that, after his deposition, his boys reminded him about the plastic bat.

Jury Instructed on Primary Assumption of Risk re: Coparticipants

Since plaintiff's legal theories alleged in the second amended complaint were premised on ordinary negligence, the jury was instructed on the negligence standard of "reasonable care to prevent harm" to others. The trial court also instructed the jury using a standard jury instruction for primary assumption of the risk involving *coparticipants* in a sport activity, based on former CACI No. 408 (CACI No. 408).[3] The instruction communicated that if plaintiff was participating in a sports activity at the time of his injury, then to establish defendant's liability as a coparticipant in the sports activity, plaintiff must prove that defendant "acted so recklessly that his conduct was entirely outside the range of ordinary activity involved in the sports activity." The trial court modified the instruction in minor respects, including by adding a parenthetical statement that "if you find [plaintiff] was not participating in a sports activity at the time he was injured, you will not use this instruction."

The Jury's Specific Factual Findings

On August 19, 2016, the jury returned its special verdict, making the following findings of fact in response to the questions presented on the special verdict form:

1. "Was [defendant] RYAN BEARD participating in a sports activity at the time [plaintiff] JOHN C. HEFLEBOWER was injured?" Answer: "Yes." (By answering "yes," the jury was instructed to answer question 2.)

2. "Was [plaintiff] JOHN C. HEFLEBOWER participating in a sports activity at the time he was injured?" Answer: "No." (By answering "no," the jury was instructed to answer question 3.)

3. "Did [plaintiff] JOHN C. HEFLEBOWER know the sports activity was occurring at the time he was injured?" Answer: "Yes." (By answering "yes," the jury was instructed to answer question 4.)

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[3] This standardized civil jury instruction has subsequently been renumbered as CACI No. 470 (July 2018 ed.).

4. "Was [defendant] RYAN BEARD's conduct so reckless that his conduct was entirely outside the range of ordinary activity involved in the sports activity?" Answer: "No." (By answering "no," the jury was instructed to answer no further questions and to sign the form.)[4]

Judgment Entered Based on Special Verdict

On August 26, 2016, based on the findings of fact made by the jury on the special verdict form, the trial court entered judgment in favor of defendant. After reciting the jury's answers to questions No. 1 through 4 of the special verdict form, the trial court ruled as follows: "It appearing by reason of said verdict that: Plaintiff John C. Heflebower is not entitled to judgment against Defendant Ryan Beard because the doctrine of assumption of the risk bars the Plaintiff's claims because the injuries he sustained arose from a risk inherent in the sporting activity in which Beard was engaged."

Motion for New Trial Denied

Plaintiff filed a motion for new trial, arguing among other things that the special verdict form was erroneous and inconsistent with the assumption of risk jury instruction. On November 4, 2016, the trial court denied the motion for new trial. The trial court explained: "The Court properly tasked the jury with making preliminary fact findings as to the doctrine of assumption of the risk. The jury did so. There was nothing inconsistent in their findings. The Court then properly decided the legal issue of duty based upon the preliminary facts as found by the jury. Because the Court found no duty [pursuant to primary assumption of the risk], there was no negligence."

On November 23, 2016, plaintiff filed his notice of appeal from the judgment.

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[4] The remaining questions, which the jury was told it did not need to answer (based on the responses to the first four questions), were questions No. 5 through 10 on the special verdict form, which addressed negligence, causation, damages, and contributory fault.

DISCUSSION

I. Standard of Review

The application of the affirmative defense of primary assumption of the risk requires a legal conclusion that "by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 314–315 (*Knight*).) Because the existence and scope of a defendant's duty of care is an issue of law determined by the court, we review that issue de novo. (*Shannon v. Rhodes* (2001) 92 Cal.App.4th 792, 796.) Additionally, we apply a de novo standard of review to questions of whether the jury was erroneously instructed (*Harb v. City of Bakersfield* (2015) 233 Cal.App.4th 606, 617), as well as to questions of whether the jury made inconsistent findings on a special verdict form or whether the special verdict form was legally deficient. (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 707; *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325.)

II. Overview of Primary Assumption of Risk

Plaintiff's appeal challenges the propriety of the trial court's determination that primary assumption of the risk was applicable in this case, arguing among other things that the jury was improperly instructed and/or misled by an inapplicable jury instruction on primary assumption of the risk and/or by an alleged inconsistency (or conflict) between the jury instruction and the special verdict form. We begin with an overview of the law concerning primary assumption of the risk.

Primary assumption of the risk is typically asserted as a defense to personal injury claims arising from an active sport or recreational activity that is engaged in "for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury." (*Peart v. Ferro* (2004) 119 Cal.App.4th 60, 71.) "Although persons generally owe a duty of due care not to cause an unreasonable risk of harm to others (Civ. Code, § 1714, subd. (a)), some activities—and

specifically, many sports—are inherently dangerous. Imposing a duty to mitigate those inherent dangers could alter the nature of the activity or inhibit vigorous participation." (*Kahn v. East Side Union High School Dist*. (2003) 31 Cal.4th 990, 1003 (*Kahn*).) "The primary assumption of risk doctrine, a rule of limited duty, [was] developed to avoid such a chilling effect." (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154.)

Where conditions or conduct that otherwise might be viewed as dangerous are an integral part of the sport itself, courts should not "hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport" because "in the heat of an active sporting event …, a participant's normal energetic conduct often includes accidentally careless behavior…. [V]igorous participation in such sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct." (*Knight*, *supra*, 3 Cal.4th at p. 318.) Thus, in cases where the defense is applicable, a plaintiff's claim arising out of risks inherent in the sport activity is "barred entirely because of a *legal* determination that the defendant did not owe a duty to protect the plaintiff from the particular risk of harm involved in the claim." (*Kahn, supra*, 31 Cal.4th 990, 1003, citing *Knight*, *supra*, 3 Cal.4th at pp. 310, 314–315.)

As articulated by the Supreme Court, when an injury arises out of a sports or recreational activity, " 'the question whether the defendant owed a legal duty to protect the plaintiff from a particular risk of harm does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather on the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport.' [Citations.]" (*Kahn, supra*, 31 Cal.4th at p. 1004; *Knight, supra*, 3 Cal.4th at p. 309.) We briefly elaborate on each of these factors relevant to the duty issue.

In making the legal determination of whether primary assumption of the risk applies—i.e., in deciding the question whether the defendant owes a duty of care to

protect the plaintiff from the particular risk of harm in the claim—the court looks first at the *nature* of the sporting activity at issue. "[I]t would not be appropriate to recognize a duty of care when to do so would require that an integral part of the sport be abandoned, or would discourage vigorous participation in sporting events." (*Kahn*, *supra*, 31 Cal.4th at p. 1004.) "Thus, the doctrine has been applied specifically to sports and sport-related activities involving physical skill and challenges posing significant risk of injury to participants in such activities, and as to which the absence of such a defense would chill vigorous participation in the sporting activity and have a deleterious effect on the nature of the sport as a whole." (*Peart v. Ferro*, *supra*, 119 Cal.App.4th at pp. 71–72.)

With respect to the sport of baseball, it has long been held that the inherent nature of the sport includes a risk to players and spectators alike of being hit by a thrown bat or a batted or thrown ball. (See, e.g., *Kahn*, *supra*, 31 Cal.4th at p. 1004 [under primary assumption of risk principles, a batter who accidentally throws a bat during a game owes no duty of care to protect spectators in the stands from being struck]; *Knight*, *supra*, 3 Cal.4th at p. 318 [noting established rule that a baseball player is not liable to other players for a carelessly thrown ball or bat during a game, absent a showing of reckless conduct that is totally outside the range of ordinary activity involved in the sport]; *Nemarnik v. Los Angeles Kings Hockey Club* (2002) 103 Cal.App.4th 631, 637 ["California courts have long held that the risk to spectators of being hit by an accidentally thrown bat or a foul ball is an inherent risk of baseball that is assumed by the spectator"]; *Ratcliff v. San Diego Baseball Club* (1938) 27 Cal.App.2d 733, 737 (*Ratcliff*) [inherent risk to spectator of a thrown bat]; see also *Quinn v. Recreation Park Assn.* (1935) 3 Cal.2d 725, 729 ["[O]ne of the natural risks assumed by spectators attending professional games is that of being struck by batted or thrown balls"].) Here, defendant asserted and the jury apparently agreed, that a variation on the sport of baseball and/or of baseball batting practice was taking place at the time of plaintiff's injury.

In addition to consideration of the nature of the sport activity, the court must also consider "the *relationship* of the defendant and the plaintiff to that activity or sport." (*Kahn, supra*, 31 Cal.4th at p. 1004, italics added.) For example, it is recognized that duties with respect to the same risk may vary according to the *role* played by particular defendants involved in the sport: "In the sport of baseball, for example, although the batter would not have a duty to avoid carelessly throwing the bat after getting a hit—vigorous deployment of a bat in the course of a game being an integral part of the sport—a stadium owner, because of his or her different relationship to the sport, may have a duty to take reasonable measures to protect spectators from carelessly thrown bats. For the stadium owner, reasonable steps may minimize the risk without altering the nature of the sport." (*Ibid*.) In most cases, the defendant's relationship to the sport activity is that of a participant or player, but other possible roles may include owners of sports facilities, and coaches or instructors. (*Id*. at p. 1005.) In the present case, the jury found defendant to be a participant in the sport activity.

The *plaintiff's* role or relationship to the sport activity must also be considered. Although in the typical case, the injured plaintiff was a coparticipant in the sport activity in which the defendant was engaged, in some instances the plaintiff was merely a spectator or in the field of play. In *Knight*, the Supreme Court cited with approval the case of *Ratcliff, supra,* 27 Cal.App.2d 733, a case involving a spectator in the stands who was struck by an accidentally thrown bat. (*Knight, supra,* 3 Cal.4th at p. 317.) The spectator had sued both the baseball player and the stadium owner for her injuries, and the Court of Appeal in *Ratcliff* affirmed the jury's decision to hold the stadium owner liable but *not* the player. In approving of *Ratcliff's* approach, *Knight* discerned that the *Ratcliff* court had implicitly recognized that two distinct questions of duty were involved, one concerning the baseball player and another concerning the stadium owner. (*Knight, supra,* 3 Cal.4th at p. 317.) We subsequently noted in *Mastro v. Petrick* (2001) 93 Cal.App.4th 83 (*Mastro*) that *Knight's* analysis of the *Ratcliff* case clearly indicated that

the doctrine of primary assumption of the risk may potentially apply where the injured party was not a coparticipant but merely a spectator: "Clearly the spectator was not a coparticipant in the baseball game. Nevertheless, the *Knight* court accepted the assumption that the relationship of the plaintiff (being a spectator) to the activity was not a relationship that should create a duty of care on the part of the ballplayer. Rather, the ballplayer was performing his sport in a place properly designated for it, and should not be restrained from vigorously engaging in his sport." (*Mastro, supra*, 93 Cal.App.4th at p. 91 [holding, by the same logic, that a snowboarder "should not be restrained or inhibited from vigorously engaging in his sport … [merely] because of the presence of skiers on the same slope"].) Finally, as noted above, in *Kahn* the Supreme Court returned its attention to the thrown baseball bat example it had mentioned in *Knight*, stating as follows: "In the sport of baseball, for example, although the batter would not have a duty to avoid carelessly throwing the bat after getting a hit—vigorous deployment of a bat in the course of a game being an integral part of the sport—a stadium owner, because of his or her different relationship to the sport, may have a duty to take reasonable measures to protect *spectators* from carelessly thrown bats." (*Kahn, supra*, 31 Cal.4th at p. 1004, italics added.)

In *Mann v. Nutrilite, Inc*. (1955) 136 Cal.App.2d 729, another nonparticipant or spectator case, the plaintiff was a chaperone for a girls' softball team and was standing *in the field of play* during pregame warm-up when she was hit in the head by a thrown ball. (*Id*. at p. 729.) In concluding that assumption of the risk was applicable to the plaintiff/ chaperone's claims, the Court of Appeal stated: "The general rule is well established that the risk of being struck by batted or thrown balls is one of the natural risks assumed by spectators attending a ball game, in the absence of a sufficient showing that ordinary care was not exercised by the management. The rules established in that connection should be much more applicable where the injured person goes *on the field of play* and is, in effect, in the position of a participant." (*Id*. at p. 734, italics added.)

As we summarized in *Mastro* regarding the parties' *relationship to the sport* as an aspect of the duty analysis: "[W]hen the injury occurs in a sports setting the court must decide whether the nature of the sport and the relationship of the defendant and the plaintiff to the sport—as coparticipant, coach, premises owner or *spectator*—support the legal conclusion of duty. [Citation.] And where a court concludes no duty exists, our Supreme Court has labeled this lack of duty as the doctrine of 'primary assumption of risk.' [Citation.]" (*Mastro, supra,* 93 Cal.App.4th at p. 88, italics added.) As discussed above, we explicitly pointed out in *Mastro* that primary assumption of the risk is not limited solely to coparticipants, since the Supreme Court in *Knight* had endorsed its application where the injured party was a spectator. (*Mastro,* at pp. 89–90.) *Mastro* was not a spectator case, but involved an injury to a snow skier by a snowboarder using the same slope or venue. Since the two activities were distinct, with differing degrees of risk, the parties were not coparticipants in the same sport activity. Nonetheless, we concluded that primary assumption of the risk was applicable, holding that "one who is pursuing his sport in an appropriate venue owes no duty of care to those who choose to occupy the same venue to engage in their (possibly different) activity simultaneously." (*Id*. at p. 90.)

When primary assumption of the risk applies, the defendant does not have a duty to protect the plaintiff from the risks inherent in the sport activity, but the defendant generally *does* have a duty not to *increase* the risk of harm beyond what is inherent in that sport activity. (*Nalwa v. Cedar Fair, L.P., supra,* 55 Cal.4th at p. 1154; *Kahn, supra,* 31 Cal.4th at p. 1004; *Peart v. Ferro, supra,* 119 Cal.App.4th at p. 73, fn. 4.) In cases involving coparticipants in a sport, our Supreme Court has explained that because imposing liability for "normal energetic conduct" while playing—including for careless conduct—would deter vigorous engagement in the sport and alter its fundamental nature, coparticipants breach a duty of care to each other only if they "intentionally injure[ ] another player or engage[ ] in conduct that is so reckless as to be totally outside the range

of the ordinary activity involved in the sport." (*Kahn, supra,* 31 Cal.4th at p. 1005; *Knight, supra,* 3 Cal.4th at pp. 320–321.)

III. No Prejudicial Error From CACI No. 408 or Conflict with Special Verdict Form

Presumably because there was a factual issue regarding plaintiff's degree of involvement or participation—if any—in the asserted sports activity at the time of his injury, the trial court elected to instruct the jury using CACI No. 408, which instruction sets forth the standard of care to be applied where a plaintiff is a *coparticipant* in a sports activity. As modified by the trial court, the CACI No. 408 instruction was as follows:

> "If you find that [plaintiff] was participating in a sports activity at the time he was injured, [plaintiff] contends that [defendant] is responsible for that injury. (If you find [plaintiff] was not participating in a sports activity at the time he was injured, you will not use this instruction). To establish this claim, [plaintiff] must prove all of the following:
>
> "1. That [defendant] acted so recklessly that his conduct was entirely outside the range of ordinary activity involved in the sports activity;
>
> "2. That [plaintiff] was harmed; and
>
> "3. That [defendant's] conduct was a substantial factor in causing [plaintiff's] harm.
>
> "Conduct is entirely outside the range of ordinary activity involved in the sports activity if that conduct can be prohibited without discouraging vigorous participation or otherwise fundamentally changing the sports activity.
>
> "[Defendant] is not responsible for an injury resulting from conduct that was merely accidental, careless or negligent."

Even though CACI No. 408 is plainly a correct statement of the primary assumption of the risk doctrine as set forth in *Knight*, *supra*, 3 Cal.4th at p. 320, plaintiff argues that the trial court erred and misled the jury in giving that instruction because, in the end, the jury determined that plaintiff was *not* a participant in the sports activity and

the instruction articulated the standard applicable to coparticipants. We disagree that prejudicial error has been shown. The instruction, as modified by the trial court, directed that "if you find [plaintiff] was not participating in a sports activity at the time he was injured, you will not use this instruction." There is no reason to believe the jury did not follow the trial court's clear directive to not use the instruction if plaintiff was not a participant. In other words, it appears that the jury, in reading this instruction, would simply have proceeded to the task before it of answering the questions set forth in the special verdict form. Thus, even assuming *arguendo* it was error to use the instruction when it was uncertain whether plaintiff would be deemed a coparticipant in the sports activity, no prejudice has been shown. "In order to persuade an appellate court to overturn a jury verdict because of instructional error, an appellant must demonstrate that 'the error was prejudicial [citation] and resulted in a "miscarriage of justice." ' [Citations.] Instructional error ordinarily is considered prejudicial only when it appears probable that the improper instruction misled the jury and affected the verdict." (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1213.) No such prejudicial error has been demonstrated.

Plaintiff also argues the trial court's use of CACI No. 408 conflicted with the special verdict form. The purported conflict was as follows: While CACI No. 408 set forth the reckless conduct threshold of liability where the plaintiff was a coparticipant in a sports activity, the special verdict form (in question 4) asked the jury to proceed to decide whether defendant's conduct was reckless (i.e., outside the bounds of the risks inherent in the sport) *even though*, in response to question 2 on the verdict form, the jury had specifically found that plaintiff was *not* a coparticipant. We disagree with plaintiff's contention that there is a necessary conflict between CACI No. 408 and the special verdict form. The two are in conflict only if one mistakenly assumes that the only possible basis for applying the doctrine of primary assumption of the risk is where the injured party is a coparticipant in the sport. But, as we explained in our overview of the

law (above), at least in the context of sports such as baseball—with its inherent risk of getting hit by a foul ball or a thrown bat—the doctrine has been applied to persons who are merely spectators in the stands and/or passive observers in the field of play. (See, e.g., *Mastro, supra,* 93 Cal.App.4th at p. 91 [noting defense available in spectator cases]; *Mann v. Nutrilite, Inc*., *supra*, 136 Cal.App.2d at p. 734 [chaperone in field of play was in a position comparable to a participant].)

In any event, the jury could not have been misled because it was not the jury's role to decide whether primary assumption of the risk was applicable under a given set of facts such that the reckless conduct standard of care would apply; that was solely the task of the court. As the Supreme Court stated in *Knight*: "[T]he question of the existence and scope of a defendant's duty of care is a *legal* question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury." (*Knight*, *supra*, 3 Cal.4th at p. 313.) Here, the preliminary findings of fact on the special verdict form were to assist the trial court in making its determination of the issue of law regarding the applicability of primary assumption of the risk. The jury was given a specific list of questions on which findings of fact were requested, and the jury did exactly what it was asked to do. However, *the legal issue* of whether the particular findings of fact were sufficient to support the conclusion that primary assumption of the risk applied (including the reckless conduct standard)—*even though* plaintiff was not a coparticipant in the sports activity—was not something the jury could be misled about, because it was not the jury's decision. Rather, because the trial court alone was tasked with determining whether the findings of fact supported application of the doctrine of primary assumption of the risk, the instruction of the jury using CACI No. 408 and/or the purported conflict with the special verdict form could not have had any impact on the outcome of the case. Consequently, no prejudicial error stemming from the jury instruction or the purported conflict with the special verdict form has been shown.

IV. The Special Verdict Form Failed to Include Factual Issues Necessary to Allow the Trial Court to Conclude that Primary Assumption of Risk Applied

Plaintiff argues that "[u]pon finding Plaintiff was a nonparticipant in any sports activity, the primary assumption of risk defense became inapplicable" and, as a result, rather than being directed by the special verdict form to answer question 4 (the reckless conduct standard for purposes of primary assumption of the risk) the jury should have been directed to answer question 5 which addresses whether defendant was negligent. In essence, plaintiff challenges the special verdict form as contrary to established law. Defendant responds that plaintiff's legal premise (i.e., that the defense is only available to coparticipants) is faulty because case law has applied the defense in the baseball context to persons who were not participants in the sport but merely spectators at the game or in the field of play. In reply to defendant's argument, plaintiff points out that there was no finding of fact made by the jury on the special verdict form that plaintiff was either a spectator or in the field of play, and therefore the trial court could not have permissibly concluded, on the basis of the jury's preliminary findings of fact, that primary assumption of the risk applied on those hypothetical grounds. As plaintiff's counsel argues: "The Special Verdict form did not ask the jury whether Plaintiff was in a 'field of play' or whether Plaintiff was a 'spectator,' and the jury made no such determination. [Therefore,] [t]his Court cannot possibly deny Plaintiff's right to a fair trial by speculating as to what the jury did or did not believe." As explained more fully below, we believe that plaintiff is correct.

In broad terms, the issue before us may be characterized as whether the trial court correctly concluded, based on the particular findings of fact set forth in the special verdict form, that primary assumption of the risk was applicable in this case. However, in view of plaintiff's argument that the special verdict form improperly directed the jury to apply the standard applicable to primary assumption of the risk, we believe the issue is more precisely framed as whether the special verdict form was fatally defective in failing to

include essential controverted issues that had to be found by the jury in order for the trial court to resolve the question of whether primary assumption of the risk was applicable. The fundamental problem, as alluded to above, is that the jury was never asked to make findings on whether plaintiff was either a spectator or in the field of play.

We analyze the sufficiency of a special verdict form de novo. (*Saxena v. Goffney*, *supra*, 159 Cal.App.4th at p. 325.) In reviewing a special verdict, we do not imply findings on all issues in favor of the prevailing party, as we would with a general verdict. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285.) That is so because of the nature of a special verdict. " ' "[A] special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, … and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law." [Citation.]' " (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 136 (*Trejo*); see Code Civ. Proc., § 624.) " 'The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. "[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict …." ' " (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960.)

" ' "A special verdict is 'fatally defective' if it does not allow the jury to resolve every controverted issue." ' " (*Trejo*, *supra*, 13 Cal.App.5th at p. 136; *Saxena v. Goffney*, *supra*, 159 Cal.App.4th at p. 325.) If a special verdict form is used but no findings are made on one or more essential factual issues, the legal question before the court cannot properly be decided because it is "like a puzzle with pieces missing; the picture is not complete." (*Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 855, fn. omitted.) For all these reasons, where a special verdict form leaves out an issue of ultimate fact necessary to resolve the question of law before the court, the special verdict will be found fatally defective and the matter may be reversed and remanded for a new trial. (*Fuller-*

Austin Insulation Co. v. Highlands Ins. Co. (2006) 135 Cal.App.4th 958, 1006–1007 [special verdict form "fatally defective" warranting reversal and retrial because it did not permit the jury to resolve the controverted issue of plan's "reasonableness"]; see *Trejo, supra*, 13 Cal.App.5th at pp. 137–141 [special verdict form fatally defective for not including question permitting the jury to make a finding on issue of failure to warn, holding that on remand any special verdict form must include that question]; *Vanderpol v. Starr* (2011) 194 Cal.App.4th 385, 396–397 [special verdict form which failed to ask jury to decide issue of injury to plaintiff's use or enjoyment of property was defective on its face; new trial ordered]; *Falls v. Superior Court*, *supra*, 194 Cal.App.3d at pp. 854–855 [mistrial properly granted where jury failed to answer all the essential factual questions on special verdict form necessary to determine liability].)

In the present case, the jury followed the special verdict form and made the following findings of fact in response to the first three questions: (i) defendant was participating in a sport activity at the time of the accident, (ii) plaintiff was not participating in the sport activity at that time, and (iii) plaintiff knew the sports activity was occurring at the time he was injured. Based on these three findings of fact by the jury, the trial court concluded that primary assumption of the risk was applicable. The fourth and final finding of fact on the special verdict form—i.e., that defendant's conduct was not so reckless as to be outside the range of ordinary activity involved in the sport activity—logically presupposes the trial court's conclusion to apply primary assumption of the risk. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112 [once court resolves legal issue of duty, the question of whether a defendant's conduct increased risks inherent in the sport is a factual question for the jury]; accord, *Fazio v. Fairbanks Ranch Country Club* (2015) 233 Cal.App.4th 1053, 1061–1063.)

We agree with plaintiff's position that the findings of fact on the special verdict form did not support the trial court's legal conclusion that primary assumption of the risk was applicable. One of the essential considerations in the trial court's duty analysis is

plaintiff's relationship to the sport activity. (*Kahn, supra,* 31 Cal.4th at p. 1004; *Knight, supra,* 3 Cal.4th at p. 309.) Ordinarily, in cases where the defense is found to apply, the relationship is that of a willing coparticipant in the sport activity. (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11 ["Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks"].) Here, since the jury found plaintiff was *not* a coparticipant in the sport activity, it became essential for the trial court to know whether plaintiff was, factually speaking, either involved as a spectator or situated in the field of play, since these would be the only alternative grounds for concluding that primary assumption of the risk was applicable. (See, e.g., *Mastro, supra,* 93 Cal.App.4th at p. 91 [defense available in spectator cases]; *Mann v. Nutrilite, Inc., supra,* 136 Cal.App.2d at p. 734 [chaperone in field of play was is a position comparable to a participant, therefore defense available].) However, as plaintiff correctly points out, the jury never made such findings and was not asked to do so on the special verdict form—even though there were several divergent accounts at trial of where plaintiff was located in the backyard, his distance from the batter and what he was doing at the time of the injury. In light of this conflicting testimony, the crucial questions of whether plaintiff was a spectator of the sport activity and/or was situated in the field of play at the time of his injury were factual issues that had to be resolved by the jury. Unfortunately, the special verdict form did not ask the jury to address or make findings on those matters, and there is no way of forecasting what the jury would have found.

Therefore, lacking essential factual findings by the jury upon which to ascertain the nature of plaintiff's relationship to the sports activity—specifically, whether plaintiff was a spectator or in the field of play at the time of his injury—the trial court was not in a position to reach the conclusion that primary assumption of the risk was applicable. Consequently, we hold the trial court erred in concluding the defense applied. The mere fact that plaintiff subjectively knew the sports activity was happening was clearly

insufficient, by itself, to permit the conclusion that plaintiff was involved as a spectator or positioned in the field of play. Moreover, we are not prepared to hold, at least not on this record, that simply because defendant and others were engaged in something like home run derby or batting practice with a wiffle ball during a backyard barbeque and swim party it would, as a matter of law, convert all parts of the yard into the equivalent of Wrigley Field or a little league stadium and automatically make everyone in the yard a "spectator" or "in the field of play" for purposes of primary assumption of the risk regardless of where they were situated or what they were doing. Rather, as we have explained, a more complete factual basis for ascertaining plaintiff's relationship to the sport activity was required and should have been addressed on the special verdict form. Because the special verdict form failed to permit the jury to make factual findings on whether plaintiff was a spectator or in the field of play, which were necessary to permit the conclusion that primary assumption of the risk applied in this case, the special verdict was fatally defective and the trial court's judgment based thereon was in error.

V. Matters Raised After Grant of Petition for Rehearing

On December 19, 2018, after issuing an opinion in substance the same as this one, we granted defendant's petition for rehearing. For various reasons, defendant claimed he had not been provided a fair opportunity to brief the issues relating to the special verdict form. In an abundance of caution, we granted the petition. In doing so, we authorized the parties to file supplemental briefing on the following questions: "(1) Did the special verdict (i.e., the jury's factual findings) returned by the jury on the special verdict form provide a legally sufficient basis for the trial court's conclusion that primary assumption of the risk was applicable? (2) Was the special verdict form fatally defective for failure to allow the jury to decide whether appellant John C. Heflebower was within the field of play and/or a spectator in the sporting activity as a factual premise for the trial court's legal conclusion that primary assumption of the risk was applicable? (3) Were the foregoing issues regarding the special verdict and/or the special verdict form waived

based on principles of forfeiture, consent or invited error, or was any error that may have occurred harmless?"

We have received supplemental briefing from the parties on the above issues and have heard oral argument. As explained below, we reject defendant's arguments that the special verdict form was adequate, merely advisory, or that regardless of any deficiency therewith we may simply imply findings in support of the judgment. Furthermore, we reject defendant's claims that the errors were waived, forfeited, the product of invited error or otherwise harmless. In setting forth our reasoning below, we first address defendant's legal arguments that the special verdict form and judgment were proper, and after that the claims of waiver, invited error and harmless error.

A. Defendant's Arguments in Support of Special Verdict/Judgment

We have already explained at length above, in the preceding part of this opinion, our views that (i) the factual findings on the special verdict form were inadequate to support the trial court's conclusion that primary assumption of the risk was applicable in this unique case, and (ii) the special verdict form was defective because it failed to allow the jury to resolve the essential factual issue of whether plaintiff was in the field of play or involved as a spectator at the time of his injury. We need not repeat ourselves on those matters. Therefore, at this point in our discussion we proceed directly to a consideration of the merits of defendant's six counterarguments by which he seeks to persuade us to reach a different conclusion.

First, defendant argues that the special verdict establishes the jury "clearly and unequivocally" rejected plaintiff's version of the case and instead accepted defendant's version. We disagree. In relevant part, the jury found only that plaintiff was not a participant in the sporting activity and that he knew the sporting activity was occurring. Such minimal findings do nothing to resolve the conflicting testimony concerning the pivotal issue of the nature of plaintiff's relationship to the sporting activity at the time of injury. The findings simply do not, as defendant suggests, establish the jury *must have*

credited defendant's version of events—i.e., that plaintiff was standing 10 to 15 feet away in the direction over defendant's left shoulder, watching defendant's batting demonstration while following or participating in the banter about the Giants versus the Dodgers. We decline to engage in speculation, but we note that one could just as easily suggest that when the jury found plaintiff was not a participant, it was thereby rejecting defendant's version of the facts in favor of plaintiff's account that he was on the patio, putting on a shirt. In short, defendant's assertion that the special verdict form somehow establishes the jury clearly adopted defendant's version of every contested issue is without merit.

Second, defendant argues that because application of the assumption of the risk is a legal question for the trial court to decide (see *Kahn*, *supra*, 31 Cal.4th 990, 1004 [defense depends on issue of duty, a question of law for the court]), the trial court was free to select which controverted factual issues it wanted the jury to resolve and which controverted factual issues it would determine on its own. Under this line of argument, it was allegedly proper for the trial court to reserve to itself the field of play and/or spectator factual issues, rather than presenting those to the jury. We are not persuaded by defendant's argument, for the reasons noted below.

Although it is the responsibility of the trial court to make the ultimate legal determination of whether, as an issue of duty, primary assumption of the risk will apply, that determination must be based not only on the nature of the sports activity, but also on the relationship of the defendant and the plaintiff to that activity. (*Kahn*, *supra*, 31 Cal.4th at p. 1004; accord, *Mastro*, *supra*, 93 Cal.App.4th 83, 88.) Here, the underlying material facts necessary to the trial court's duty analysis were disputed, with conflicting testimony presented at trial bearing on the essential issues of whether the activity defendant was engaged in was mere horseplay rather than a sporting event, as well as the nature of plaintiff's relationship to that activity (e.g., where plaintiff was located and what he was doing). Because of the conflicting and widely divergent accounts of what

actually happened that day, the trial court correctly recognized that, as a foundation for its duty analysis, it needed the jury to make preliminary findings of fact. The method employed by the trial court and the parties was that of a special verdict form.

Having elected to use a special verdict form, all the rules and pitfalls applicable to that process came into play—including that the special verdict form had to provide for the jury to make all the ultimate factual findings necessary to allow the trial court to draw its legal conclusion. " ' "[A] special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, … and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law." [Citation.]' " (*Trejo, supra,* 13 Cal.App.5th at p. 136; see Code Civ. Proc., § 624.) " 'The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. "[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict …." ' " (*Myers Building Industries, Ltd. v. Interface Technology, Inc., supra,* 13 Cal.App.4th at p. 960.)

Moreover, defendant's hypothesis that the trial court reserved the issues of field of play and spectator status to itself is not borne out by the record. Although early in the trial court's back-and-forth discussion with the parties' attorneys about how the case might be presented to the jury, the possibility of the trial court deciding the field of play issue was briefly mentioned, there is no evidence that such an approach was carried out by the trial court. To the contrary, the trial court's written judgment based on the special verdict, after first summarizing the facts found by the jury on the special verdict form, stated that "*by reason of said verdict*" the doctrine of primary assumption of the risk barred plaintiff's claims. (Italics added.) No mention was made by the trial court of any factual findings outside of the jury's findings on the special verdict form. Moreover, as was clearly stated by the trial court in its order denying the new trial motion: "The Court

properly tasked the jury with making preliminary fact findings as to the doctrine of assumption of the risk. The jury did so.… The Court then properly decided the legal issue of duty *based upon the preliminary facts as found by the jury*." (Italics added.) It is clear the trial court was not relying on its own independent resolution of the conflicting testimony to decide underlying factual controversies about what happened; nor was it making findings on factual issues beyond the jury's special verdict. To the contrary, it appears that the jury's findings of fact on the special verdict form constituted the entire factual foundation for the trial court's decision to apply primary assumption of the risk. For the foregoing reasons, defendant's argument on this point is unpersuasive and we reject it.

Third, defendant contends that the jury's findings of fact on the special verdict form were merely advisory. Defendant's argument is based on a process available in cases involving equitable actions or discrete equitable issues, concerning which there is no right to a trial by jury. In those situations, the court is the trier of fact but may request advisory findings from a jury. (See *A-C Co. v. Security Pacific Nat. Bank* (1985) 173 Cal.App.3d 462, 473–474, citing *De Arellanes v. Arellanes* (1907) 151 Cal. 443, 449.) We are not convinced that the present case was a situation entailing an advisory verdict. A tort action to recover damages for personal injuries, which was the nature of the action here, is legal in character, not equitable, and as such, the ultimate factual issues are triable to a jury. (See 7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 84, p. 111 [action for damages for personal injury is a legal action triable to jury]; *Jefferson v. County of Kern* (2002) 98 Cal.App.4th 606, 609 [in action against physician for malpractice damages, trial judge improperly deprived the plaintiff of right to jury trial on issue of dates of accrual of cause of action by deciding that issue in separate proceeding under Code Civ. Proc., § 597].) Accordingly, the cases cited by defendant are distinguishable. Although it is true the issue of duty was a question of law for the trial court to decide, the jury in this case was appropriately called upon to resolve the conflicts in the testimony in order

to determine what actually happened at the time of injury on factual matters relating to the defense of primary assumption of the risk. Accordingly, this was *not* a situation where the verdict was, or may have been, treated as advisory in nature.

Fourth, defendant argues that the special verdict was merely ambiguous and the trial court construed it as establishing primary assumption of the risk. (See *Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092; *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456–457.) We disagree. Aside from the fact there is no evidence in the record the trial court was construing an ambiguity, the special verdict form is quite clear and specific. The problem was not an ambiguity that needed clarifying by means of judicial construction, but, as discussed previously above, a failure to allow the jury to find all the ultimate facts necessary for the trial court to render its conclusion of law that primary assumption of the risk was applicable. That is, this was *not* a question of ambiguity, but of a fatally inadequate special verdict.

Fifth, defendant argues that we may imply findings in support of the trial court's judgment because "no statement of decision under section 632" of the Code of Civil Procedure was requested. (See *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58–60 [explaining rule of implied findings in a bench trial where appellant failed to demand a statement of decision under Code Civ. Proc., § 632].) Defendant's position is unpersuasive because the present case did not involve a bench trial. By its own terms, section 632 of the Code of Civil Procedure is only available "upon the trial of a question of fact by the court." Defendant refers us to *Pate v. Channel Lumber Co.* (1997) 51 Cal.App.4th 1447 (*Pate*), but that case is distinguishable. In *Pate*, the jury rendered a special verdict on the legal claims for breach of contract and misrepresentation. An equitable claim for declaratory relief was severed and tried separately by the trial court, and a statement of decision was issued by the trial court on the declaratory relief issues. (*Id.* at pp. 1450–1451.) Here, unlike the situation in *Pate*, we are not dealing with a distinct equitable cause of action severed from the rest of the

case. As noted, plaintiff's case was an action at law to recover tort damages for personal injuries, not an equitable action. As such, it was triable to the jury, not the court. Moreover, no part of the case was severed from the rest for a court trial. For these reasons, *Pate* is inapposite and does not support defendant's argument.

It bears repeating that, in this case, the testimony presented by the witnesses at trial was materially at variance on matters critical to the applicability of the primary assumption of the risk defense, and the jury was properly called upon to resolve the conflict in the testimony and make findings of fact to decide, in essence, what actually happened at the time of the injury. This was to be done by means of a special verdict, by answering the questions posed on the special verdict form. As we have noted, when a special verdict process is utilized, the findings of fact are required to be sufficient to allow the trial court to decide the question of law—here, the question of law was whether the affirmative defense applied. (Code Civ. Proc., § 624 [a special verdict must present conclusions of fact as established by the evidence, "and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law"].)

In summary, a special verdict form was used with respect to essential factual underpinnings of the primary assumption of the risk defense in this case. Because the trial court and parties adopted the special verdict form process, we are bound by the rules pertaining thereto. One such rule is that when a special verdict is involved, "a reviewing court does not imply findings in favor of the prevailing party." (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc*. (2005) 126 Cal.App.4th 668, 678.) For all these reasons, we reject defendant's argument that we may imply findings.

Sixth, defendant argues that when the trial court denied plaintiff's motion for new trial, it somehow resolved or cured any deficiency in the findings of fact on the special verdict form. We disagree. The trial court's order denying the motion for new trial addressed plaintiff's ground for the motion that the "CACI 408 Instruction and the

Special Verdict form were conflicting" and therefore constituted an error of law. The order makes no mention of whether plaintiff was in the field of play or a spectator, and the order clearly reflects that the trial court's judgment on the special verdict had relied exclusively on the facts found by the jury on the special verdict form. Accordingly, we reject this argument as unpersuasive and unsupported.

B. Waiver, Invited Error and Harmless Error

Finally, defendant argues that any error relating to the special verdict or special verdict form were waived or forfeited, the product of invited error, or that such error was harmless and nonprejudicial. Below, we explain why each of these assertions by defendant is unpersuasive.

1. Alleged Waiver or Forfeiture by Failure to Object

Defendant argues that plaintiff's failure to object to the inadequacy of the special verdict before the discharge of the jury forfeited any right to claim on appeal that the special verdict was defective. The basic rule is that "[f]ailure to object to a verdict before the discharge of a jury and to request clarification or further deliberation precludes a party from later questioning the validity of that verdict if the alleged defect was apparent at the time the verdict was rendered and could have been corrected." (*Keener v. Jeld-Wen, Inc*. (2009) 46 Cal.4th 247, 263–264, italics omitted, citing *Henrioulle v. Marin Ventures, Inc*. (1978) 20 Cal.3d 512, 521.) That is, where the error was apparent at the time of the verdict and could have been cured by further deliberation, the failure to object results in a forfeiture of the right to challenge the defective verdict on appeal. (*Keener v. Jeld-Wen, Inc*., *supra*, 46 Cal.4th at pp. 264–265.) " 'The obvious purpose for requiring an objection to a defective verdict before a jury is discharged is to provide it an opportunity to cure the defect by further deliberation.' " (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1242, quoting *Juarez v. Superior Court* (1982) 31 Cal.3d 759, 764.) The rule not only promotes efficiency but also deters gamesmanship. (*Taylor v. Nabors Drilling USA, LP*, *supra*, 222 Cal.App.4th at p. 1242.) " ' " ' " 'The

law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.' " ' [Citation.]" [Citations.]' " (*Keener v. Jeld-Wen, Inc., supra*, 46 Cal.4th at pp. 264-265, quoting *People v. Simon* (2001) 25 Cal.4th 1082, 1103.)

In support of its argument that a forfeiture occurred, defendant notes the special verdict form was structured such that, if the jury found (i) defendant was participating in a sports activity, (ii) plaintiff knew the sports activity was occurring at the time he was injured (even if he was not a coparticipant in the sports activity), and (iii) defendant was not reckless, then the jury was instructed to answer no further questions and to sign the form, "thus rendering a defense verdict and ending the case." We agree that is how the special verdict form was structured. Once the above findings were made, the jury was directed to sign the form without answering any of the remaining questions about plaintiff's damages or defendant's negligence liability.

In light of this overall structure of the special verdict form and of the special verdict actually rendered by the jury, and since the special verdict was deficient in a manner that defendant believes could have been cured by further deliberation, defendant argues it was incumbent upon plaintiff to protect his rights by objecting at the time of the verdict and requesting that the jury deliberate on the field of play and/or spectator issues. According to defendant, the defect was apparent at the time of the verdict and there was still an opportunity to correct it before the jury was discharged. That is, prior to discharge of the jury, the field of play and/or spectator questions could easily have been presented to the jury if a timely objection to the special verdict had been made by plaintiff. Defendant's position is that plaintiff's failure to object brings this case within the forfeiture rule discussed above.

Plaintiff argues this case comes within one or more recognized exceptions to the forfeiture rule discussed above. Plaintiff notes that "[w]aiver is not found where the record indicates that the failure to object was not the result of a desire to reap a 'technical advantage' or engage in a 'litigious strategy.' " (*Woodcock v. Fontana Scaffolding & Equip. Co., supra,* 69 Cal.2d 452, 456, fn. 2.) The forfeiture rule is also inapplicable where the jury's findings of fact were fatally inconsistent. (See, e.g., *Trejo, supra,* 13 Cal.App.5th 110, 123–124 & fn. 4; *Zagami, Inc. v. James A. Crone, Inc., supra,* 160 Cal.App.4th 1083, 1091–1092; *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 187.) Moreover, a forfeiture need not be found where the failure of the special verdict form to include an essential finding was not "an ambiguity that needed clarification; [but] … simply the absence of a factual finding necessary to support a cause of action," and thus there was no support for the trial court's entry of judgment. (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 531–532 (*Behr*).) In other words, if the party is not challenging the special verdict form *as such*, but its lack of support for the trial court's entry of judgment on a particular theory, the reviewing court need not find that a forfeiture occurred. (*Ibid.*; see *Saxena v. Goffney, supra,* 159 Cal.App.4th at pp. 327–328.) *Behr* also explained that "Behr, as the plaintiff, had responsibility for submitting a verdict form sufficient to support her causes of action. [Citation.] If she chose not to include a proposed factual finding essential to one of her claims, it is not incumbent on Redmond, as the defendant, to make sure the omission is cured." (*Behr,* at pp. 531–532, fn. omitted; see also *Saxena v. Goffney, supra*, 159 Cal.App.4th 316, 328 ["If [a party] chose to submit a verdict form tendering less than their full case to the jury," the other party would have "no further incentive to object"].)

On balance, we agree with plaintiff that his failure to object to the jury's special verdict did not result in forfeiture. As in *Behr*, the error here was not an ambiguity or uncertainty that needed clarification, but the absence of a finding essential to the trial court's conclusion of law and judgment that primary assumption of the risk applied in

this case. That is, the problem was not so much the special verdict form itself, but that the trial court entered judgment based on the findings in the special verdict form that were insufficient to support the judgment. Once the jury found that plaintiff was not a coparticipant in the sports activity, the special verdict form contained no other findings (such as field of play or spectator status) that could have potentially provided a factual basis for application of that defense. Since this was defendant's affirmative defense, defendant had the primary responsibility to ensure the essential factual issues were tendered to the jury on the special verdict form. (See *Amerigraphics, Inc. v. Mercury Casualty Co*. (2010) 182 Cal.App.4th 1538, 1557.) In any event, the findings that were actually made by the jury on the special verdict form were insufficient to allow the trial court to conclude that primary assumption of the risk was applicable. Based on the foregoing, we conclude the forfeiture rule did not apply. (*Behr, supra,* 193 Cal.App.4th 517, 531–532.)

2. Alleged Invited Error

Defendant next argues that plaintiff cannot complain of an error that plaintiff personally invited in the trial court. The concept of invited error has been summarized as follows: "The 'doctrine of invited error' is an 'application of the estoppel principle': 'Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal' on appeal." (*Norgart v. Upjohn Co*. (1999) 21 Cal.4th 383, 403.) "At bottom, the doctrine rests on the purpose of the principle, which is to prevent a party from misleading the trial court and then profiting therefrom in the appellate court." (*Id.* at p. 403.)

The doctrine of invited error does not apply when a party, while making appropriate objections, acquiesces in a judicial determination. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212.) Accordingly, " ' "[a]n attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and

endeavoring to make the best of a bad situation for which he was not responsible." ' " (*Id.* at pp. 212–213.) Additionally, the doctrine of invited error does not apply when the trial court's ruling was based on its own determination of the merits of the issue, not on the parties' argument or misleading conduct. (*Baxter v. State Teachers' Retirement System* (2017) 18 Cal.App.5th 340, 378; *Munoz v. City of Union City* (2007) 148 Cal.App.4th 173, 178.)

Here, there were extensive discussions between counsel and the trial court regarding the special verdict form and the jury instructions. The concerns that were addressed during these discussions included whether the presentation of closing argument, instruction of the jury and jury deliberation should be bifurcated into two phases or heard all at once; whether the recklessness issue should go to the jury or be decided by the trial court; and what specific questions of fact should be asked of the jury on the special verdict form so that the trial court would be able to decide whether primary assumption of the risk was applicable. In the early part of the discussions, the trial court expressed uncertainty about whether the "field of play" issue should be determined by the jury on the special verdict form. In response, defendant's attorney initially indicated the trial court could resolve that issue on its own, based on the evidence. Meanwhile, the response of plaintiff's attorney was vague, but he agreed that the main focus should be on defendant's conduct and whether there was a sports activity. Later in the day, defendant's attorney changed his mind and specifically urged the trial court to include, in addition to the question about whether defendant was engaged in a sports activity, two additional questions on the special verdict form: one to ask whether plaintiff was a participant in the sports activity, and the last question to ask whether plaintiff was in the field of play. Plaintiff's counsel responded that he preferred, rather than adding any more questions, to have just "the simple issue [of] whether there was a sporting activity." Plaintiff's counsel stated that, if the jury decided there was no sporting activity, "we're in an ordinary negligence case." On the other hand, if the jury said "yes" there was a sports

activity, then "we would argue … the analysis the Court has to undertake is whether … there is … substantial evidence to support a recklessness finding under *Knight*."

Eventually, the trial court had heard enough and said, "Stop… [¶] … [¶] … We're going to do one argument—period. I may submit three questions." Later, the trial court reaffirmed its holding that the matter would be presented to the jury all at once, not in two phases, and that it "[would] be submitted to the jury on a special verdict form that the Court worked on." At that point, the trial court allowed the parties' attorneys to state their objections, if any, on the record. Defendant's attorney stated his objection to the jury's consideration of recklessness. Plaintiff's attorney stated his objection to the trial court's refusal to bifurcate the jury deliberations into two phases and reiterated his position that the decisive question on assumption of the risk would be whether defendant was engaged in a sports activity. Plaintiff's attorney did not express any objection to the particular questions set forth on the special verdict form relating to primary assumption of the risk and did not request that any additional questions be added.

Based on the above synopsis, we conclude that the parties' lengthy and circuitous arguments to the trial court did not induce or mislead the trial court to commit the error on the contents of the special verdict form. It appears the trial court listened to both sides, was not persuaded by either, and made up its own mind about what it was going to do. Therefore, the error with respect to the special verdict form was based on the trial court's own determination of the merits of the issue, not on the parties' argument or conduct. We conclude there was no invited error. (*Baxter v. State Teachers' Retirement System*, *supra*, 18 Cal.App.5th at p. 378; *Munoz v. City of Union City*, *supra*, 148 Cal.App.4th at p. 178.)

3. Alleged Harmless Error

Finally, defendant argues that the error of the fatally deficient special verdict was harmless. Although a reviewing court may not imply findings to save a defective special verdict, the error is nevertheless subject to harmless error analysis. (*Taylor v. Nabors*

Drilling USA, LP, *supra*, 222 Cal.App.4th at p. 1244.) The error in the *Taylor* case was a result of an inadvertent "typo." (*Ibid*.) The court in *Taylor* went on to conclude that, under the aggravated circumstances of that case, the judgment was "clearly right" and it did not result in a miscarriage of justice since there was no legitimate doubt about the omitted finding. (*Id*. at p. 1246.) In the present case, we cannot conclude the error was harmless. Once the jury found that plaintiff was not a coparticipant in the sports activity, the entire case hinged on whether plaintiff was in the field of play or involved as a spectator. The outcome of that factual issue was not obvious from the conflicting testimony, and under the circumstances we are unable to speculate what the jury would have decided; nor can we say that the trial court's judgment was clearly right. Therefore, the judgment cannot be salvaged here under a harmless error analysis.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for a new trial. Costs on appeal are awarded to plaintiff.

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LEVY, Acting P.J.

WE CONCUR:

_____
SMITH, J.

_____
DE SANTOS, J.